EXHIBIT 3 BUH
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HB 589

Business and Labor Committee hearing Feb. 17, 2009
Re: HB 589
Testimony from Andy Scott, Livingston, MT

Mr. Chairman, members of the committee. Thank you for letting me say a few words today in support of House Bill 589 introduced by Rep. Pomnichowski. This is a very simple bill with modest intentions, but should you approve of this bill the effect will be to correct a flaw in the statute governing workers compensation that puts Montana law at odds with, and in violation of, the equal protection clauses of the state and federal constitutions. It will also benefit the likely small number of people who, like me, have had or will have their workers compensation claim denied because they have fallen through the cracks of this flawed section of the law.

Let me say up front that, though it was my own experience with the workers compensation system that led me to learn about the history and effects of this small piece of the law, I stand to gain nothing by the passage or failure to pass this legislation. My case has been settled and I'm no longer affected. However, it required a fair amount of research and some degree of tenacity on my part to see my case through to a conclusion. It also required some financial commitment that was not easy for me to afford at the time. I can easily imagine that not all workers affected by this will have the means or desire to pursue their case through the courts. That's why I urge you to make that unnecessary for them with the passage of this bill.

It's not just me making this claim about the constitutionality of the statute. The Montana Supreme Court has already decided this matter. In the 2003 case of Schmill v. Liberty Insurance, the Court found that the existing Occupational Disease Act violated equal protection guarantees. As you know, a workplace injury is defined as being caused by a specific event on a single day or during a single work shift, and an occupational disease is defined as being contracted over the course of more than one work day or shift. In the Schmill case, the Supreme Court said that workers who suffer an occupational disease should be afforded the same protections as workers who suffer from workplace injuries.

In 2005, the legislature set out to correct the law and bring it in line with the court's decision in Schmill. In that year, Senate Bill 481 abolished the Occupational Disease Act, and folded its provisions within the Workers Compensation Act. The intent of that bill was laid out very clearly in Section 2, which said "Compensation for occupational diseases must be equal to the compensation and medical benefits provided for injuries in this chapter."

Unfortunately, the language supplied by Senate Bill 481 in that year did not have that result.

Quoting the current law, paragraph 2 of MCA 39-71-407 says "An insurer is liable for an injury, as defined in 39-71-119, if the injury is established by objective medical findings

and if the claimant establishes that it is more probable than not that a claimed injury occurred, or a claimed injury aggravated a preexisting condition."

By contrast, paragraph 9 of the same section says an occupational disease is considered compensable if "the events occurring on more than a single day or work shift are the major contributing cause of the occupational disease in relation to other factors contributing to the occupational disease." In other words, the factors must meet a standard of more than 50 percent of the cause (again "the major contributing cause").

The flaw here is, I think, easily demonstrated by my own case, and I'd like to very briefly provide some background. In 2007, over the course of a week or two I developed a severe pain in my neck and shoulder that grew worse when I was at work, and then diminished when I went home. Naturally, I assumed my work was a factor so I initiated a workers compensation claim and started seeing a doctor in Bozeman. This doctor ordered an MRI, which showed that I had some degeneration in my cervical spine. He said it was normal for my age. But while he did find that my work was a factor, he was at first unable to say that it was "the major contributing cause," or more than a 50 percent cause.

The State Fund had me see another doctor for evaluation. That doctor looked at my MRI and said the degeneration he saw was normal for my age. He said that an MRI done on a random selection of men my age (51 at the time) would find that half would show worse degeneration, and the other half less severe. "You're right down the middle," he said. This doctor also said he believed my work to be a factor in my symptoms, but he was unable to make that declaration it was at least 50 percent of the cause.

Now understand that if this had been the result of an injury, or something that happened in the course of one day or workshift, there would have been no questions asked. My medical costs would have been covered. But since it had developed over the course of two or more workshifts, the doctors had to say that workplace factors met the 50 percent threshold.

This is exactly what the Supreme Court concluded in Schmill is unacceptable and a violation of equal protection. Yet, when the legislature rewrote the law in response to *Schmill*, it left that equal protection flaw intact when it said injured workers need only prove an injury aggravated a pre-existing condition but a worker suffering occupational disease must prove that workplace aggravations amounted to more than half the cause.

Judge Jeremiah Shea expressed the problem eloquently in a case called *Oksendahl v. Liberty Insurance*, a case that came before him after the Schmill decision, but it was governed by the old law. In Oksendahl, Liberty Insurance denied an occupational disease claim because it did not meet the 50 percent threshold. Judge Shea rejected that, and said:

> Even if it was not obvious from the holdings in Polk and Murray that Respondent's 51% threshold argument is meritless, one need only ponder the practical ramifications of Respondent's argument to comprehend its infirmity. Before the Montana Supreme Court in

> *Schmill* struck down 39-72-706, MCA, as unconstitutional, an OD claimant who established that his or her condition was less than 50 percent related to working conditions could nonetheless recover ***something*** under the ODA, albeit only a proportional amount. With *Schmill* holding this statute violated OD claimants' right to equal protection, however, Respondent would now have this Court conclude the end result is that an OD claimant who establishes that his or her condition is less than 50 percent related to working conditions recovers ***nothing*** under the ODA, not even the proportional amount he could have recovered pre-*Schmill*. In the annals of jurisprudence, this would stand as one of the more paradoxical remedies of a constitutional violation.

Now it might seem a reasonable question to wonder why a worker should be compensated at all if workplace factors weren't "the major contributing cause" of their affliction. Setting aside the fact that the two classes of workers are treated differently and that's what the Supreme Court found unconstitutional, why shouldn't a worker pay for his or her medical treatment if workplace factors don't rise to that 51 percent threshold?

Well, the easy answer is to point out the difficulty doctors face determining the subtle difference between 49 and 51 percent, a small difference that would make the difference between compensation and no compensation. Again, consider my case—I had a pre-existing condition that was "typical" for my age. I also had workplace factors that both doctors believe played a role. Both were necessary, but perhaps neither was sufficient by themselves to produce the symptoms I was feeling.

But this kind of philosophical question is beside the point in light of numerous Court decisions that point out that "an employer accepts his employee with all of his injuries and diseases."

> It has long been the law of Montana that employers take their workers as they find him, with all their underlying ailments, and that a traumatic event or unusual strain which lights up, accelerates, or aggravates an underlying condition is compensable. *Weatherwax v. State Fund* (2000 MTWCC 15)
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> "The rule is that when preexisting diseases are aggravated by an injury and disabilities result, such disabilities are to be treated and considered as the result of the injury." *Strandberg v. Reber Co.*, 179 Mont. 173, 175, 587 P.2d 18, 19 (1978).

See also *Kober v. Buttrey Foods* (WCC No. 9311-6951):

> It is a well established Montana rule of law that the employer takes the employee subject to the employee's physical condition at the time of

> employment. *Robins v. Anaconda Aluminum Co.*, 175 Mont. 514, 575 P.2d 67 (1978); *Shepard v. Midland Foods, Inc.*, 205 Mont. 146, 666 P.2d 758 (1983). An employee who suffers from a preexisting condition is entitled to compensation if the condition was aggravated or accelerated by the industrial injury. *Hash v. Montana Silversmith*, 248 Mont. 155, 158, 810 P.2d 1174 (1991) (citing *Shepard v. Midland Foods.*)....
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> The Montana Supreme Court has previously considered and dismissed arguments that the direct effects of an aggravation should be separated from the effects of the preexisting condition itself and that the insurer's liability in aggravation cases should be limited to the direct effects of the aggravation. In *Robins* the Supreme Court rejected a contention that the effects of a prior work related injury must be factored out of the disability determination in a subsequent injury case. The insurer in that case argued that "only the effects of the 1973 injury can be considered" and "that any disability claimant has from the 1964 injury cannot be a factor in determining claimant's current disability." 175 Mont. at 519. The Supreme Court rejected the arguments and held that claimant was entitled to permanent total disability benefits based on his overall condition.

It is this long and commonly held principle that led the court to say in *Polk v. Planet Insurance* that "occupational aggravations of preexisting non-occupational diseases are compensable, as are occupational diseases which are aggravated by non-occupational factors."

It is also very interesting to note that the phrase "the major contributing cause" was originally in the statute under paragraph 4, where it says injuries are not compensable if drugs or alcohol were the "major contributing cause" of the injury. So when the legislature added the occupational disease language to the statute in 2005, they simply recycled that language, even though it was meant to describe something NOT compensable and completely unrelated to either actual injuries or occupational disease.

I hope that my testimony here has helped you to see why the current statutory language is in violation of the principles confirmed by the Supreme Court in Schmill, and that this is a problem that needs to be resolved for the benefit of the citizens of Montana.